No. 12431

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

It is conceded that the Statement of the Case as set forth in Appellant's brief, P. 3 to 6, is substantially correct except date of original arrival of Yee Don Found, the father of Appellee, which was August 6, 1929 (Plaintiff's Exhibit 1, R. 23, 24, 39, 47).

The Appellant objects to the jurisdiction of the trial court on the ground the Appellee had never been in the United States prior to the commencement of this action. The Appellant further alleges that the trial court erred in declaring Appellee to be a national of the United States because his father did not have a residence in the United States for ten years prior to the birth of the Appellee. These points are the gist of the case.

JURISDICTION

This action was brought under authority of Section 503 of the Nationality Act of 1940, 8 U.S.C., 903, on the ground the Appellee is a national and a citizen of the United States since birth as provided for by Section 201(g) of the same Act, 8 U.S.C. 601, quoted in Appellant's brief, P. 2, 3.

It is well settled that actions under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, may be brought in any United States District Court in any State. Jurisdiction was assumed in the following cases:

Brassert v. Biddle, Attorney General, 2d Cir. 148 Fed (2d) 134;

Bauer v. Clark, Attorney General, 7th Cir. 161 Fed. (2d) 397;

Attorney General v. Ricketts, 9th Cir. 165 Fed. (2d) 193;

Podeau v. Acheson, 3d Cir. 170 Fed. (2d) 306;

Nuspel v. Clark, (D.C. E.D. Mich.) 83 Fed. Supp. 963;

Chin Wing Dong v. Clark, (D.C. W.D. Wash) 76 Fed. Supp. 649;

Gan Seow Tun v. Carusi, (D.C. S.D. Cal.) 83 Fed. Supp. 480 and 482;

Look Yun Lin v. Acheson, (D.C. N.D. Cal.) 87 Fed. Supp. 463.

In the last case cited Judge Erskine says:

"By the terms of Section 503 of the Nationality Act of 1940 this action may be brought in the District Court of the United States for the District in which the plaintiff claims a permanent residence. * * * Defendant's first objection goes to the issue of venue or 'territorial jurisdiction,' contending that plaintiff has no possible claim to permanent residence in this district. However, the statute permits suit to be brought in the district where the plaintiff 'claims' a permanent residence * * * . *Actual residence at present or at any time in the past is not required.* * * * In view of the fact that an attempt was made by the father to bring his alleged daughter, the plaintiff, to this country while she was still a minor, plaintiff has some basis for a bona fide claim of permanent residence within this district. This Court should not presume a change of domicile or residence in order to defeat venue. * * * In the present case, where the plaintiff is abroad, and the issue of venue is raised, it is the District Court of the Northern District of California in which the facts of the case are most readily available, since plaintiff's claim to citizenship stems from her father, a resident of California." (Italics supplied).

It is self-evident that the Appellant's Specification of Errors, P. 7, 8, is definitely and completely defeated and repudiated by Section 503 quoted by Appellant, P. 2.

Restatement of Conflicts, Sec. 30, states a minor child has the same domicile as that of his father.

In re *Chung Toy Ho*, (C.C. D. Ore.) 42 Fed 398, a Chinese merchant petitioned for entrance of his wife and daughter. They came from China, sought admittance and were refused. The Treaty of 1888 forbade the entrance of Chinese laborers, but the Treaty of 1884 stated Chinese merchants can come and go of their own free will. The court held that

> "It is impossible to believe that parties to this treaty, which permits servants of a merchant to enter the country with him ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission is found in the fact that the domicile of the wife and children is that of the husband and father." In re *Tung Leone*, (D.C. D. Cal.) 19 Fed. 184.

The principle that a child's domicile is that of his father is expressly stated in *Lamar v. Micou*, 112 U. S. 452, 470. The children involved in this case had a guardian in New York. They lived in Georgia, their parents having died. The issue is over an

accounting of the wards' property by the estate of the guardian. The court stated:

> "The law of domicile governs the status of a person and the disposition and management of his property. An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own, and after his death the mother, while she remains a widow, may likewise, by changing her domicile change the domicile of the infants; the domicile of the children in either case, following the independent domicile of their parent."

Yarborough v. Yarborough, 290 U.S. 202. In this case, a daughter sued her father for support money while attending school in South Carolina. Previously, Yarborough had secured a Georgia divorce in which there had been a final adjudication of alimony and support. The father contends South Carolina must give full faith and credit to the Georgia decree. It was contended that since the child was not a formal party to the Georgia suit she is not bound by the decree.

The Supreme Court held the decree was binding on the child. It was further contended the Georgia order should not be binding on the child since she was not a resident of Georgia at the time it was entered. The court stated:

> "Being a minor Sadie's domicile was that of her father * * * She was not capable of changing her domicile by her own act. Neither the temporary residence in North Carolina at the time the divorce suit was begun nor her removal with her mother to South Carolina before entry of judgment effected a change of Sadie's domicile. The mere fact the parents were living separately at the time the suit for divorce was brought and that the child was with her mother does not establish a relinquishment of parental authority."

Delaware v. Petrowsky, 2nd Cir. 250 Fed. 554.

The case involves the right of an emancipated child to sue. In discussing domicile the court said that the law is well established that every person at his birth acquires a domicile of origin which is that of the person on whom he is legally dependent which in the case of a legitimate child is that of his father. The general rule is also well established that a person while a minor being non sui juris cannot change his or her domicile.

> "The words domicile and residence are frequently used synonomously by the courts and in statutes, but technically the latter word indicates merely the present place of abode of a person whether temporary or permanent, whereas domicile always means a permanent home." *Funk & Wagnall's New Standard Dictionary*, P. 2092, 1935.

> "Residence of a wife is that of her husband; of a child, that of the father. * * * Act or fact of

abiding or dwelling in a place for some time; act of making one's home in a place." *Webster's Standard Dictionary*, P. 1814, 1933.

"Temporary residence out of state, even for an indefinite period, will not constitute person 'non-resident,' if, at departure and during absence, he had intention to return to state." *Appleton v. Southern Trust Co.*, 51 S.W. (2d) 447.

CITIZENSHIP

"All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States." R.S. 1993 8 U.S.C. 6, First Edition. *Weedin v. Chin Bow*, 274 U.S. 657.

Section 1993 of the Revised Statutes was replaced by the Act of May 24, 1934, 8 U.S.C. 6, First Pocket Edition. The latter Act provides that "Any child hereafter" born out of the jurisdiction of the United States to an American citizen parent must come to the United States before 13 years of age in order to continue status of American citizenship.

The Act of May 24, 1934 was repealed and replaced by Section 201 of the Nationality Act of 1940, 8 U.S.C. 601.

Therefore, the father of the Appellee has been a citizen of the United States since birth. Appellant

concedes that the father is a citizen (R. 41, Appellant's Brief 6). His citizenship status is the same as a son of a late president of the United States born in Canada, now a Congressman from the State of New York and conceded by eminent lawyers to be eligible to hold the office of president of the United States. Such citizenship is distinguished from that by naturalization. The Appellee was born in China on March 16, 1941 (R. 47), and is a citizen of the United States under Section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601.

RESIDENCE

The record evidence shows that Yee Don Found, father of Appellee, arrived in the United States at Boston, Massachusetts on August 6, 1929. (Plaintiff's Exhibit 1, R. 23, 24, 39, 47).

On the father's first return to China he left the United States on August 21, 1936 and returned on August 9, 1938, (R. 47). He was absent from the United States less than two years.

On the second trip the father left the United States on January 6, 1940 and returned August 28, 1941 (R. 30, 47). He was absent less than one year and eight months.

The record further shows that the father established a residence in the United States in 1929 and has consistently claimed a residence in the United States at all times since.

On each of the aforementioned two trips to China he applied for and received from the Immigration Service a Return Citizen's Certificate, Form 430, unlimited as to absence and was admitted under authority of said certificates upon return (Plaintiff's Exhibits 8 and 9, R. 26, 30, 45).

During 1948 the father made a brief visit to China and returned with his wife and two other children via San Francisco, November 18, 1948, in possession of a passport issued by the Department of State. (R. 37, 40). He was prohibited from bringing his alien wife to this country until after the Immigration Act of 1924 was amended on August 9, 1946, 8 U.S.C. 213(c).

The views expressed by the Appellant raises the question of whether a citizen of the United States could go to Canada on a ten-day fishing trip without losing his right of residence. If this question be answered "no" could a citizen of the United States leave his residence here and proceed under contract for an indefinite period to work in the oil field in Canadian territory at the Arctic always with the in-

tention of returning, and does return to the United States within two years? The answer is that there is no authority to hold under such circumstances a citizen of the United States since birth could lose his citizenship or right of residence. Under Section 404 of the Nationality Act of 1940, 8 U.S.C. 804, a naturalized citizen may lose citizenship and right of residence if absent more than two years at any one time, — under circumstances stated. If this last provision of law is enforced the person involved could only be admitted on return as an alien in possession of an Immigration Visa and upon payment of head tax.

Section 10 of the Immigration Act of 1924, 8 U.S.C. 210, provides for the issuance of a Permit to Reenter the United States in case of an alien who has a legal permanent admission, valid for one year with the privilege of renewal for unlimited periods of six months, and credited with returning from a temporary absence abroad. An *alien* under this provision does not lose right of acquired residence even if absent more than two years.

The Act of September 13, 1888, of the Chinese Exclusion Laws, concerning the departure and return of alien Chinese laborers, 8 U.S.C. 275 - 278 (Repealed by the Act of December 17, 1943, 8 U.S.C.

261, Pocket Edition) provided for the issuance of return certificates valid for return within one year from date of departure, with the privilege of an extension of one year if unavoidably detained, without losing right of residence in this country. See *Ex Parte Woo Show How* (D.C. W.D. Wash.) 17 Fed. (2d) 652 and *Ex Parte Yee Gee*, (D.C. N.D. Cal.) 17 Fed. (2d) 653.

Passports are issued by the State Department at Washington, D. C. valid for return within two years, subject to renewal by consuls in foreign countries, to citizens for the purpose of visiting in foreign countries. Act of May 16, 1932, 22 U.S.C. 217(a). It is unthinkable that the United States would treat any form of a return certificate issued to a citzen as a "scrap of paper" or attempt to penalize the rights of a citizen or deprive a citizen of acquired residence on the ground of absence of less than two years.

ARGUMENT ON THE MERITS

All of the present nationality and naturalization laws are included in the Nationality Code of 1940 (8 U.S.C. 907).

H. R. 6127, superseded by H. R. 9980 was a "Bill to Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code" and was debated and considered by the Com-

mittee on Immigration and Naturalization on various dates between January 17 and June 5, 1940. The committee was assisted by experts on the subject from the Departments of State, Labor and Justice, the Immigration and Naturalization Service and the Bar Association of the District of Columbia. Section 201(g) was eventually passed by the House and Senate in accordance with the original administration bill.

It is important to note that "continuous residence" was not mentioned in the Committee consideration of Section 201(g). The distinction between "residence" and "continuous residence" is material.

8 U.S.C. 504:

> "Sec. 104. For the purposes of Sections 201, 307(b), 403, 404, 405, 406 and 407 of this Act, the place of general abode shall be deemed the place of residence."

Domicile is not mentioned in any of the foregoing sections.

House Committee Report, H.R. 9980, p. 54:

> "Mr. Poage. I see. 'Place of general abode' is about as broad a definition as I have ever seen." (Representative William R. Poage, Texas, member of committee considering bill).

Section 307(a) of the Nationality Code of 1940 (8 U.S.C. 707) includes the term "resided continu-

ously" twice among the requirements for naturalization.

> "Sec. 307(b) * * * Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship * * *."

If the lawmakers intended in Section 201(g) that the father "reside continuously" in the United States it is evident that they would have said so as they did in Section 307 of the same act.

The attention of the Court is invited to the case of *Devenuto v. Curran, Commissioner of Immigration*, 9th Cir. 299 Fed. 206, wherein "residence," "continuous residence," and "domicile" with reference to the Immigration and Naturalization laws as well as other laws is discussed with authorities.

We quote some of the outstanding points from the foregoing decision:

P. 209:

> "A person's domicile is the place where he has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Immigration Rules Feb. 1, 1924, rule 12, subd. A, par. 2. No person is without a domicile, and he can have but one at the same time. Assuming that Devenuto was born in Italy of Italian parents, his domicile of origin was in that country. If, after he attained his majority, he came to the

United States with the intention of remaining here and making this his permanent home, and was admitted into this country, he thereby acquired an American domicile. For it is a rule of common law that every person sui juris may acquire a domicile of his own choice. * * * A domicile of choice is determined upon residence and intent * * *."

P. 211.

"Residence denotes a place of abode, without regard to whether it be temporary or permanent, while a domicile is the place where the law regards the person to be, whether or not he is corporeally found there. And one may have several residences at the same time but he can have only one domicile at a time."

P. 212.

"If Congress had meant that the alien must remain actually within the territory of the United States uninterruptedly during the five years, it would have used language like that of Act March 3, 1813, c. 42, No. 12, 2 Stat. 811 'for the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the said five years out of the territory of the United States'." (Quoting from in *Re Schneider*, 164 Fed. 335).

* * *

"If the facts do not clearly show an intention on the part of the applicant to abandon a residence which he has acquired in this country, he must be deemed to be continuing to reside here." (Quoting from *United States v. Cantini*, 199 Fed. 857).

In *United States v. Rockteschell*, 9th Cir. 208 Fed. 530, the court held that the Naturalization Act did not require an applicant for citizenship to be physically present continuously in the United States for a period of five years. It will be noted that the statute in question provided as follows:

> "No alien shall be admitted to become a citizen who has not, for the continued term of five years next preceding his admission, resided within the United States."

Quoting from the decision (p. 532-533):

> "It is familiar knowledge that the word 'reside' is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat. 153 c. 28), the requirement was simply of five year's residence in the United States, and as then construed the term 'residence' meant 'domicile'. *In re an Alien*, Fed. Cas. No. 201a. By the amendment of March 3, 1813 (2 Stat. 811 c. 42) the section was made to read as follows: 'No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for a continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States'. Through the change thus wrought Con-

gress very clearly evinced its intention of requiring continuous physical presence. But upon the other hand, the fact that in the revision clause, 'without being at any time during the said five years out of the territory of the United States,' was omitted, would seem to indicate a purpose again to abandon this requirement. It has been held that under the present law continuity of physical presence is not required. *In re Schneider* (C.C.) 164 Fed. 335; *United States v. Cantini* (D.C.) 199 Fed. 857. This we believe to be a correct interpretation both of the new law and of Section 2170 of the Revised Statutes. To establish a residence there must doubtless be a concurrence of act and intent; but when once established, temporary absenses from time to time, unaccompanied by an intent to abandon or change the residence, do not interrupt the continuity therof. There is nothing in the Naturalization Act, other than the phrase itself, 'has resided continuously within the United States,' to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences."

CONCLUSION

The father of the Appellee has been a citizen of the United States since birth under Section 1993 of the Revised Statutes and has been a bona fide resident of the United States since August 6, 1929. He made three temporary trips to China and on his last trip returned with his wife and two other children. On each of his trips he first obtained from the government assurance of return and returned to an unrelinquished residence. The Appellee was born in China on March 16, 1941 to a father who had a residence of more than ten years in the United States and is therefore a citizen of the United States since birth.

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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